

13th day of February, 2002

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-20/51109

PRELIMINARY RECITALS

Pursuant to a petition filed November 7, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Fond du Lac County Dept. of Social Services in regard to Medical Assistance (MA) spousal impoverishment, a hearing was held on December 5, 2001, at Fond Du Lac, Wisconsin. At the request of petitioner's representative (wife), the record was held open for two weeks for the submission of the community spouse's monthly budget and documentation to the Division of Hearings and Appeals (DHA). The petitioner's wife's submission was timely received at DHA.

The issue for determination is whether the community spouse's income allocation may be increased.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Representative:

(petitioner's wife)

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Julie Roseneau, ESS
Fond Du Lac County Dept Of Social Services
87 Vincent Street
Fond Du Lac, WI 54935-4595

ADMINISTRATIVE LAW JUDGE:

Gary M. Wolkstein
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Fond du Lac County who has been a resident of a nursing home since about February, 2001. His wife resides in a home in the community.
2. Petitioner's monthly income is solely \$1,241 in monthly Social Security Disability payments. See Exhibit 1. His wife has monthly gross earned and unearned income of \$1,170.68. See Exhibit 2. Wife's earned income is from her employment as a staff person at Lake View Assisted Living.
3. During about October, 2001, petitioner requested an increase in the income allocation to his wife as the community spouse. The county agency sent a November 21, 2001 Notice of Decision to the petitioner which determined the allocation to his community spouse to be \$2,024.50. See Exhibit 3. The petitioner's cost of care contribution was determined to be \$343.18. See Exhibit 3. The income allocation to petitioner's community spouse was determined to be \$853.82. See Exhibit 3. This notice indicated how those determinations had been calculated.
4. Petitioner filed this appeal on November 7, 2001 challenging the amount of his cost of care contribution, and seeking an increase in his wife's income allocation.
5. Petitioner's wife established that she has basic and necessary monthly expenses totaling about \$1,900. See Petitioner's Exhibit submitted while the record was held open.

DISCUSSION

The federal Medicare Catastrophic Coverage Act of 1988 included extensive changes in State Medicaid eligibility determinations as they relate to spousal impoverishment where one spouse is a resident in a nursing home. The purpose of the new act was to protect a "community" spouse's assets and resources and designate how a spousal share would be computed. The Act also established a new minimum needs allowance for the community spouse at a specified percentage of the federal poverty line. Sec. 49.455, Wis. Stats., is the Wisconsin codification of 42 U.S.C. s.13964-5 (MCCA). Among other thing, the "spousal impoverishment" provisions at sec. 49.455 direct the Department to establish an income allowance for the community spouse of an institutionalized person. Consequently the Wisconsin Legislature enacted sec. 49.455, Wis. Stats. in order to bring the Wisconsin Medicaid program into conformity with federal law. Section 49.455 specifically states that the department is to use the criteria of that statutory section in determining the eligibility for medical assistance under §49.46 or 49.47, Wis. Stats. and the required contribution toward the care of an institutionalized spouse.

"Community spouse" refers to the person who is married to an institutionalized individual. See sec. 49.455(1), Wis. Stats. As a general rule, no income of a spouse is considered to be available for use by the other spouse during any month in which that other spouse is an institutionalized spouse. See sec. 49.455(3), Wis. Stats. However, after an institutionalized person is found eligible for medical assistance (MA), he or she may allocate income to the community spouse.

If the community spouse's monthly income is below a certain amount, the institutionalized spouse may allocate some of his or her income to bring the community spouse's income up to that amount. That amount is the lesser of \$2,175 or \$1,935.00 plus an excess shelter allowance. In this case, sec. 49.455(4)(c), Wis. Stats., the Medical Assistance Handbook, Appendix 23.6.0. (1-1-01 edition), and sec. 49.455(4)(b), Wis. Stats., allow an increase in the monthly community spouse allotment by order of a fair hearing administrative law judge (ALJ) or a court. See also MA Handbook, Appendix 23.6.0. In its November 21, 2001 Notice of Decision, the county agency determined petitioner's community spouse's income allocation to be \$2,024.50

In order to increase the allotment, the ALJ must find exceptional circumstances resulting in financial duress. See sec. 49.455(8)(c), Stats. The hearing officer does not have unfettered discretion in creating an exception to the maximum allocation ceiling, however. The relevant statutory provision states that the test for exception is as follows:

(c) If either spouse establishes at a fair hearing that, **due to exceptional circumstances resulting in financial duress**, the community spouse needs income above the level provided by the minimum monthly maintenance needs allowance determined under sub. (4)(c), the department shall determine an amount adequate to provide for the community spouse's needs and use that amount in place of the minimum monthly maintenance needs allowance in determining the community spouse monthly income allowance under sub. (4)(b).

(emphasis added)

Sec. 49.455(8)(c), Wis. Stats. Thus a hearing officer may augment the maximum allocation ceiling only by amounts needed to alleviate financial duress, to allow the community spouse to meet necessary and basic maintenance needs. During the hearing or while the record was held open, the petitioner's wife was unable to establish any exceptional circumstances resulting in financial duress, which justified an increase in her minimum monthly maintenance allowance.

It is important to emphasize that even if income allocation is possible, not all expenses qualify. In order for a Hearing Officer to use expenses, they must meet "**necessary and basic maintenance needs**" MA Handbook, Appendix 23.6.0. "Income Allocation". This corresponds to the statutory language that the new income amount is in lieu of the "minimum monthly maintenance needs". Sec. 49.455(8)(c), Stats., (emphasis added.) Because the community spouse is essentially asking state taxpayers to give the nursing home or group home resident more welfare in the form of MA, I do not think that every expense is automatically appropriate for inclusion, even if it is not frivolous.

During the hearing, petitioner's wife was unable to provide any list or documentation of her monthly expenses. This administrative law judge (ALJ) provided a very detailed explanation as to the documentation that she needs to submit to establish her monthly basic and necessary expenses, and why she needed an increase in her current \$2,024 community spouse income allocation. At the request of (wife), the record was held open for two weeks for her to submit a list and documentation of her basic and necessary monthly expenses. (wife) did timely submit to DHA a list of her monthly expenses (without documentation), and some documentation of her earned income.

In her submission to DHA, several items in wife's list of monthly expenses are not "basic and necessary" (or are the expenses of the petitioner and not his community spouse) and will be subtracted from the submitted monthly expenses of (wife): 1) \$50 church contribution - there is a long history of DHA decisions not allowing contributions to religious organizations as "basic" household expenses; 2) undocumented monthly dental expense of \$105 - petitioner's wife provided no explanation or documentation to establish the substantial monthly dental bill of \$105 (\$105 X 12 months = \$1,260 per year), especially since petitioner also listed dental insurance payments of \$19 (which was included as a basic expense); c) deposits into savings accounts (\$150) and gifts (\$50) are not basic and necessary expenses and can not be subsidized by State taxpayers; and d) the \$343.18 cost of care contribution is paid from petitioner's \$1,242 gross monthly income, not from his community spouse's income.

After subtracting the expense items which are not "basic and necessary" (or paid from her husband's funds), petitioner's wife's list of monthly expenses was about \$1,900. Since (wife) has already been

allocated \$2,024 in monthly income, there is no basis to increase her monthly income allocation because petitioner has failed to establish the need. Accordingly, the county agency correctly denied petitioner's request to increase the community spouse's income allocation; and correctly denied petitioner's request for a reduction in his cost of care contribution.

CONCLUSIONS OF LAW

1. The petitioner was unable to establish exceptional circumstances resulting in financial duress which justified an increase in her minimum monthly maintenance pursuant to sec. 49.455(8)(c), Wis. Stats..
2. The basic and necessary expenses of petitioner's wife (community spouse) do not warrant an increase in her income allotment.

NOW, THEREFORE, it is ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this _____ day
of _____, 2002.

Gary M. Wolkstein
Administrative Law Judge
Division of Hearings and Appeals
315/GMW